

**RULES
OF
DEPARTMENT OF REVENUE
INCOME TAX DIVISION**

**CHAPTER 560-7-8
RETURNS AND COLLECTIONS**

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(1) Definitions.

(a) **Distributions Paid or Credited.** The term “distributions paid or credited” as used in this regulation is defined in O.C.G.A. § 48-7-100(2.1) and shall include a cash payment, a distribution of other property, a credit to the member in lieu of such payment, or the member’s distributive share of the Entity’s income or other gain that is passed through to the member and which is subject to Georgia income tax. It shall not include a constructive or deemed distribution (e.g., resulting from a shift of liabilities), a return of investment or return of capital, or payments to a member in a capacity other than as a member (e.g., salaries, rents, or royalties).

(b) **Entity.** The term “Entity” shall mean an S Corporation, a Partnership, or a Limited Liability Company which is treated as a Partnership or S Corporation for Federal Income Tax purposes and which is required to file a Partnership or S Corporation return.

(2) Distributions.

(a) **Withholding Requirements.** Withholding is required at the rate of 4 percent with respect to any distributions paid or credited, unless exempted by this regulation or O.C.G.A. § 48-7-129, to a member who is not a resident of Georgia. The filing of estimated tax payments by the member does not relieve the Entity from the responsibility of the withholding requirement. Circumstances which require withholding shall include, but are not limited to, the following:

1. The payment of any periodic distributions;
2. The payment of any special distribution;
3. The crediting of a distribution in lieu of payment; and
4. The pass through of the Entity's income or other gain to the member. The amount of income or other gain that is passed through to the member is reduced by distributions paid or credited throughout the year if withholding has already occurred on such distributions.

(b) **Apportionment of Withholding.** If the Entity owns property or does business within and without Georgia, then withholding is required only on that portion of the income which is reasonably attributable to the property owned or business done within this State, such portion to be determined as provided at O.C.G.A. § 48-7-31. That portion reasonably attributable to the property owned or business done within the State shall be computed based on either facts and circumstances existing at the time the distribution is paid or credited or the current year's facts and circumstances with regard to allocable and apportionable income and the prior year's apportionment factor, if current year information is not yet available.

(c) **Annual Distributions Less than \$1,000.00.** An Entity is not required to withhold tax for a nonresident member if the aggregate annual distributions paid or credited to the nonresident member are less than \$1,000.00.

(d) **Withholding Under other Provisions of Law, etc.** Distributions paid or credited are not subject to withholding under O.C.G.A. § 48-7-129 if the distributions paid or credited to the nonresident members are subject to withholding under other provisions of Georgia law, or represent a return of such member's investment, or a return of capital, or represent previously taxed income. Distributions paid or credited are first considered to be distributed out of the member's current year distributive share of the Entity's income or other gain that is passed through to the member and which is subject to Georgia income tax. Any distributions paid or credited for the year that exceed the member's distributive share of the Entity's income or other gain that is passed through to the member are not subject to withholding.

(e) **Exempt Organizations.** Any distributions paid or credited to an exempt organization which result in unrelated business taxable income, as defined by Internal Revenue Code § 512, will be subject to withholding. Distributions paid or credited to an exempt organization that do not result in unrelated business taxable income are not subject to withholding. In this case, the exempt organization shall annually certify in writing to the Entity that the distributions paid or credited do not result in unrelated business taxable income. Such certification must be attached to the Entity's income tax return.

(f) **Insurance Companies.** An insurance company which pays a tax to Georgia on its premium income is not subject to Georgia income tax and the withholding requirements under O.C.G.A. § 48-7-129. In this case, the insurance company shall annually certify in writing to the Entity that this applies. Such certification must be attached to the Entity's income tax return.

(g) **Corporate Members.** Withholding is not required for distributions paid or credited to a corporate member which meet all three conditions listed below. On an annual basis, the corporate member must certify to the Entity in writing that this exception applies. Such certification must be attached to the Entity's income tax return. The corporation must:

1. Otherwise own property or do business in Georgia;
2. Have filed income tax returns in Georgia for the two (2) immediately preceding years and have paid all Georgia tax liabilities currently due; and
3. Make estimated income tax payments if required.

(3) Composite Returns.

(a) **Alternative to Withholding.** In lieu of withholding, the Entity may elect to file a composite income tax return for one or all of its nonresident members using Form IT-CR. The filing of the composite return shall constitute the election. Such election shall be irrevocable and must be made by the due date of the composite return (including extensions, if approved). Once the due date has expired, the composite return shall not be amended to include or exclude members. However the return must be amended to exclude members who, pursuant to subparagraph (d) of this paragraph, were not eligible to be included on the composite return (i.e. members having income within Georgia from sources other than the Entity). The computation of tax is done by creating a schedule as described in (b) below. Individuals, corporations, partnerships, limited liability companies, estates, trusts, Qualified Subchapter S Trusts, and Electing Small Business Trusts may be included on the composite return. However, a corporation is still required to file a separate net worth tax return to pay the net worth tax that is due to Georgia.

(b) **Creating a Schedule.** The Entity will create its own schedule following the examples on Form IT-CR showing the name, address, and identification number, and amount of distributions paid or credited for each member included in the computation. The schedule must also include the name, address, identification number, and amount of distributions paid or credited to any nonresident member not included in the computation of the composite return.

(c) **Computing the Tax.** Using the schedule created pursuant to (b) above, the members shall compute the tax as indicated in subparagraphs 1. and 2. below. The election of options may be changed annually; however, such election shall not be changed after the filing of the return. Any deduction that may be limited on the member's return may not be included on the composite return.

1. All individual members shall choose one of the two following options. The term "individual" shall mean a natural person:

(i) **Option 1.** The Entity may elect to compute the tax by multiplying the member's income from the Entity's business done in Georgia by the applicable tax rate. The "applicable tax rate" shall be that rate from the Tax Rate Schedule which applies to each individual member.

(ii) **Option 2.** The Entity may elect to compute the tax by determining its Georgia taxable income and calculating the tax due on the member's share of the Georgia income. Under this option, the member is allowed to take a standard deduction and a personal exemption and credit for dependents; however, the member should apportion these adjustments so that adjustments are allowed only to the extent that they apply to Georgia income. This option does not allow for adjustments to income based on self-employment, self-employed health insurance, Keogh or SEP or other adjustments normally allowed in computing Adjusted Gross Income.

2. All other members shall apply a tax rate of six percent to the distributions paid or credited to determine the amount of tax.

(d) **Members Excluded from the Composite Return.** Any nonresident member excluded from the composite return is subject to the withholding provisions and is required to file a Georgia income tax return, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129. Likewise, any nonresident member included in the computation of a composite return is not subject to the withholding provisions and is not required to file a Georgia income tax return. Nonresident members having income within Georgia from sources other than the Entity may not be included in the Entity's composite return and shall be subject to the withholding tax imposed by O.C.G.A. § 48-7-129, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129.

(e) **Composite Return Due Date.** The due date of the composite return of a calendar year Entity is the same as for a calendar year individual. Extensions and estimated tax payments for filing are the same as for individuals. A fiscal year Entity should file its return on a fiscal year basis and should file its return within 3 ½ months of the fiscal year end. Form IT-303 (application for extension) should be used if an extension of time to file is needed. Form IT-303 only extends the time to file. Accordingly, any tax that is due should be remitted by the original due date of the composite return on form CR-ES (composite estimated tax return).

(f) **Amended Composite Returns.** Except as prohibited by subparagraph (a) of this paragraph, amended composite returns may be filed during the same periods as individual returns, and may be filed by using the form IT-CR which must be plainly marked "Amended Return".

(g) **Consent Agreements.** When filing a composite return for shareholders, it is not necessary to include copies of the consent agreements required by O.C.G.A. § 48-7-27(d)(2). However, consent forms must be attached to the S Corporation return in order to maintain the S-election for Georgia purposes.

(h) **Composite Return Net Operating Losses.** The following shall apply with regard to net operating losses:

1. A net operating loss computed on a composite return may be carried to another composite return year.
2. A net operating loss cannot be carried from a year whereby the member was excluded on the composite return to a year whereby the member is included on the composite return.
3. A net operating loss must be carried from a year where the member was included on the composite return to a year the member files the member's own tax return.
4. An Entity, on behalf of a member, may elect to waive the carry back period of a net operating loss on a composite return. Such election shall be made using the same provisions that would apply to the member as if they were excluded on the composite return.

(4) **Tiered Situations.** In situations whereby distributions are paid or credited from an Entity to a member who is an Entity and to any subsequent Entities, the following shall apply:

(a) Withholding is only required by an Entity that:

1. Does business in Georgia on its own and not as a result of being a member; or
2. Owns property in Georgia on its own and not as a result of being a member;

(b) Any withholding that occurs may be passed through each tier by attaching the G-2-A and a schedule which allocates the withholding tax between the members at each tier based upon the profit/loss percentage. Failure to include this documentation will result in the disallowance of the withholding credit. A composite

return may be completed at any level. However, if the composite return is not filed by the Entity meeting either condition 1. or 2. above, withholding is still required by such Entity, unless otherwise exempted by this regulation or O.C.G.A. § 48-7-129. Tax withheld at one level can be claimed on a composite return at another level.

(c) A member which is an Entity or a corporation must include its pro rata share of the Entity's property, payroll, and gross receipts in its own three factor apportionment formula in determining how much of its income is Georgia income. In determining its income, the member includes its share of the Entity's income before the Entity apportions and allocates its income. *For tax years beginning on or after January 1, 2008, only gross receipts are included in the apportionment formula.*

(d) In determining whether withholding is required, only the members that directly own an interest in the Entity subject to withholding shall be considered.

For example:

1. An Entity that is subject to the nonresident withholding requirements has several members. One nonresident member is also a member in several other Entities that are subject to the withholding requirements. Each of the Entities must withhold on that nonresident member whether or not the total income/loss from all the Entities would result in a net loss for that member. A loss from one Entity cannot be used to offset the income in another Entity for that member.

2. Company A is subject to the nonresident withholding requirements and is in a tiered situation. Company B is a nonresident member of Company A. Company B has nonresident members, of which one is an exempt organization called Company C. Company A is required to withhold on the full distribution to Company B.

(5) Withholding Procedures.

(a) **Registration.** All Entities required to withhold taxes under O.C.G.A. § 48-7-129 must register with the Georgia Department of Revenue by completing Registration Application CRF-002. Registration for withholding requirements is to be separate and apart from the registration required for the payment of payroll taxes.

(b) **Payment of Taxes.** Payment of taxes withheld must be made to the Georgia Department of Revenue within 30 days of the close of the calendar month in which the distribution is paid or credited to the nonresident member. Payment should be remitted with Form GA-V (withholding payment voucher). In the case whereby the member's distributive share of the Entity's income or other gain is passed through to the member and is subject to Georgia income tax, the date the distribution is considered to be paid or credited is the last day of the taxable year. Payment of tax withheld in this case should be remitted on Form G-7 (withholding return).

(c) **Withholding Statement.** A Form G-2-A (Withholding on Distributions to Nonresident Members/Shareholders) showing the amount of the distributions paid or credited, the recipient's name, address, tax identification number and the amount of the Georgia tax withheld must be issued to the recipient no later than thirty days following the close of the Entity's taxable year. Copy "1" of Form G-2-A must be submitted to the Department of Revenue along with Form G-1003 (transmittal form) for such taxable year.

(d) **Credit for Withholding; Tax Year for Which Credit can be Claimed.** Recipients of distributions paid or credited are required to submit a copy of Form G-2-A with their Georgia Income Tax Return in order to receive credit for any Georgia income taxes withheld. Tax withheld from a member's distributions paid or credited must be claimed as a credit for the member's tax year in which the withholding tax year of the Entity ends.

For example:

1. **Calendar Year Taxpayer.** A calendar year S Corporation makes its sole 2004 distribution paid or credited to shareholders in December and remits withholding for 2004 in January 2005. An individual shareholder may claim a credit on the shareholder's 2004 individual income tax return (generally filed on or before April 15, 2005) for the 2004 taxes withheld by the S Corporation on the shareholder's behalf.

2. **Other than Calendar Year Taxpayer.** A calendar year partnership remits withholding taxes for 2004 during 2004 and has a corporate partner with a March 31 year end. The corporate partner may claim a credit in its entirety on its corporate income tax return for the year ended March 31, 2005 (generally filed on or before June 15, 2005) for the 2004 taxes withheld by the partnership on its behalf.

3. **Other than Calendar Year Taxpayer.** An S Corporation with a January 31, 2005 year end remits withholding taxes on behalf of its nonresident shareholders monthly during its fiscal year. A calendar year end shareholder may claim a credit on the shareholder's 2005 individual income tax return (generally filed on or before April 15, 2006) for the taxes withheld by the S Corporation on the shareholder's behalf.

(6) Undue Hardship.

(a) **Establishing Undue Hardship.** To qualify for undue hardship, the Entity must be experiencing a significant hardship. The Entity must establish undue hardship and each determination will be considered on a case-by-case basis. A written petition must be filed with the Commissioner or his delegate requesting an exemption from withholding for an Entity based on undue hardship. The petition shall be made at least sixty (60) days prior to the day on which the withholding tax is due and shall be accompanied by a full

and complete explanation of the hardship incurred. This sixty (60) day period may be modified or waived by the Commissioner for reasonable cause. The Commissioner or his delegate will carefully consider the basis of the hardship and notify the Entity in writing whether the petition is accepted or rejected. An accepted petition is valid for one year only, and petitions for undue hardship must be requested annually. Failure to receive the Commissioner's notice shall not relieve the Entity from withholding in the manner prescribed by O.C.G.A. § 48-7-129.

(b) **Circumstances Which do not Qualify.** The following circumstances will not be considered to constitute undue hardship:

1. Inability to pay;
2. Additional cost of record keeping;
3. Paperwork too cumbersome;
4. Missing K-1 data, such as social security number, address, etc.;
5. Unfamiliarity of the filing requirements; or
6. Inadequate records.

(7) **Anti-avoidance Clause.** If the Commissioner reasonably determines that a transaction or payment has been entered into for the purpose of avoiding the provisions of this regulation and O.C.G.A. § 48-7-129, he or she may characterize any payment, or portion thereof, made by the Entity to its member so as to reflect the true substance of the transaction.

(8) **Effective Date.** The principles set forth in this regulation will apply to taxable years beginning on or after January 1, 2006. Taxable years beginning before January 1, 2006 will be governed by the regulations of Chapter 560-7 as they exist before January 1, 2006 in the same manner as if the amendments thereto set forth in

this regulation had not been promulgated.

Authority O.C.G.A. §§ 48-2-12 and 48-7-129.